Supreme Court, U.S.
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061108 DEC 05 2006

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In the Supreme Court of the United States

No. _____

JANICE E. GATES,
Petitioner

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF CALIFORNIA EL DORADO COUNTY, APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Although the elements of a criminal offense are typically determined by reference to the legislative definition of the offense, is a trial court required to instruct the jury as to offense elements which do not appear in the legislative definition, but have been found to exist by judicial interpretation?

LIST OF PARTIES

Petitioner, Janice E. Gates, is represented by Victor S. Haltom, Esq., of Sacramento, California.

Respondent, the People of the State of California, are represented by Deputy District Attorney Jamie L. Verwayen, of Placerville, California.

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In the Supreme Court of the United States

No. _____

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THE PEOPLE OF THE STATE OF CALIFORNIA,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, EL DORADO COUNTY, APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

Janice E. Gates, petitions for a writ of certiorari to review the judgment in this case of the Appellate Department of the Superior Court of the State of California, El Dorado County.

OPINIONS BELOW

The opinion of the appellate division of the superior court, see App., *infra*, 1a - 9a, is unreported. The order of the appellate department of the superior court, denying Ms. Gates' application for certification for transfer to the California Court of Appeal, Third Appellate District, see App., *infra*, 10a, is unreported.

JURISDICTION

The opinion of the appellate division of the superior court was issued on August 11, 2006. App. 1a. The order of the appellate division denying Ms. Gates' application for transfer to the California Court of Appeals was denied on September 6, 2006. App. 10a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). See *Talley v. California*, 362 U.S. 60 (1960).[1]

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[1] Following a misdemeanor prosecution in California, the appellate division of the superior court is the highest available court to which a defendant may appeal, if that court refuses to certify the case for transfer to the California Court of Appeal. Hence, review in this court on certiorari is available following a decision adverse to the defendant in the appellate division. *Talley v. California*, 362 U.S. at 62.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...."

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law...."

California Penal Code § 602 provides, in pertinent part: "... [E]very person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor: ... [¶¶] ... (k)[2] Entering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property rights...."

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[2] Although Ms. Gates was convicted on two counts of violating Cal. Penal Code § 602(j), the particular subdivision of the statute in question has since been re-lettered, and is now contained in § 602(k).

STATEMENT

Ms. Gates was convicted by jury on two misdemeanor counts of trespass. App. 1a. However, in the jury trial, the trial judge failed to instruct the jury as to two contested elements of the offense of trespass. The instructional omission resulted in a violation of Ms. Gates' due process right to be protected "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime[s] with which [s]he [was] charged[,]" *In re Winship*, 397 U.S. 358, 364 (1970), and her Sixth Amendment right to have any conviction against her "rest upon a jury determination that [she] is guilty of every element of the crime[s] with which [s]he [was] charged...." *United States v. Gaudin*, 515 U.S. 506, 509 (1995).

Ms. Gates raised this instructional issue on appeal. App. 5a. However, the appellate court rejected Ms. Gates' assignment of error based upon the circumstance that the two omitted elements are not specifically mentioned in California's trespass statute. App. 5a.

The appellate tribunal applied a rule under which determination of the elements of the offense of trespass is delimited by the express terms of the trespass statute, regardless of whether additional elements have been recognized in common law to inhere in the offense. App. 5a. While there is

authority in California and other jurisdictions which supports the cramped statutory interpretation applied by the appellate tribunal in this case, *Keller v. Superior Court*, 2 Cal.3d 619, 631, 470 P.2d 617, 624, 87 Cal.Rptr. 481, 488 (1970) ("In this state the common law is of no effect so far as the specification of what acts or conduct shall constitute a crime is concerned.") (internal quotation marks omitted); *People v. Harris*, 191 Cal.App.2d 754, 757-758, 12 Cal.Rptr. 916, 919 (1961); *People v. Whipple*, 100 Cal.App. 261, 262, 279 P. 1008, 1009 (1929); *Kuhl v. Dist. Court of First Judicial Dist.*, 139 Mont. 536, 560, 366 P.2d 347, 359 (1961), this Court's precedent and other authority, including some California appellate decisions, demonstrate that the elements of a statutory offense consist not only of the elements expressly specified in the statute, but also elements which have been recognized to exist through judicial interpretation. *Neder v. United States*, 527 U.S. 1, 20 (1999); *Field v. Mans* 516 U.S. 59, 69 (1995); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)); *Morissette v. United States*, 342 U.S. 246, 262-263 (1952); *People v. Armitage*, 194 Cal.App.3d 405, 415, 239, Cal.Rptr. 515, 521 (1987); *Ex parte Hudspeth*, 100 Cal.App. 478, 479, 280 P. 179, 180 (1929).

Accordingly, within the meaning of this Court's Rule 10(b) and (c), the determination of the

state court of last resort in the instant case is in conflict with decisions of this Court and other courts in this country.

A. Basis for Jurisdiction in the Lower Courts

This is a criminal case. Because Ms. Gates was tried on misdemeanor charges, the superior court had jurisdiction pursuant to California Penal Code § 1462.2. The appellate department of the superior court had jurisdiction of Ms. Gates' appeal pursuant to Cal. Const. Art. VI, § 11, and Cal. Penal Code § 1466.

B. Procedural Background

The El Dorado County District Attorney's Office charged Ms. Gates with two misdemeanor counts of trespass under Cal. Penal Code § 602(j). App. 1a. Ms. Gates was tried by jury on both counts, and the jury found her guilty on August 20, 2004. App. 1a.

Ms. Gates appealed to the Appellate Department of the El Dorado County Superior Court. On August 11, 2006, that court affirmed the judgment of conviction against Ms. Gates. App. 1a, 8a. On September 6, 2006, the appellate department denied Ms. Gates' application to have the case

certified for transfer to the California Court of Appeal. App. 10a.

C. The Underlying Facts

For approximately three decades, Ms. Gates and her family have lived on a 40-acre parcel of ranching property in El Dorado County, California. App. 3a. During certain periods of their residency at the ranch, the Gates family has been enmeshed in land use disputes with neighbors. App. 2a-5a.

During Ms. Gates' trial, neighbors testified that they observed Ms. Gates on property owned by other neighbors — riding horses with her family on one occasion, and driving a pick-up truck on another occasion. App. 2a. One of the areas on which Ms. Gates was observed is a road, over which several neighbors have a deeded easement. App. 2a. The prosecution adduced evidence that Ms. Gates did not have permission from the neighboring landowners to be on their property for the purposes for which Ms. Gates was there. App. 2a-4a.

Ms. Gates and her daughter testified that, with respect to the occasion on which they were horseback riding, they were traveling on the easement road through one neighbor's property to visit another neighbor, at the latter's invitation. App. 3a-4a. With respect to the occasion on which Ms. Gates was observed driving a pick-up truck on

a neighbor's property, she testified that she was spraying an herbicide on weeds with the neighboring landowner's permission. App.3a-4a.

D. Appellate Litigation

On appeal, Ms. Gates contended that the trial court had failed to accurately instruct the jury concerning all of the elements of the trespass charges. App. 5a. In this regard, Ms. Gates contended that the trial court's charge to the jury concerning trespass erroneously omitted to reference the elemental requirements that the accused {1} invaded another's exclusive right of possession,[3] and {2} interfered with, obstructed, or

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[3] See *People v. Sweetser*, 72 Cal.App.3d 278, 285, 140 Cal.Rptr. 82 (1977) (To sustain a trespass conviction under Cal. Penal Code § 602, "it is not sufficient merely to show that the accused willfully entered upon the fenced lands of another without written permission and then refused to leave the lands when requested to do so; it is also incumbent to prove that the accused's presence on the land constituted a trespass in the sense that he invaded another's exclusive right of possession.") (citing 1 Rest.2d Torts, at pp. 275-276 (1965); 75 Am.Jur.2d, *Trespass* § 22 (1974)); *accord*, *New Mexico v. GE*, 335 F.Supp.2d 1185, 1232 (D.N.M. 2004) ("'Historically, the requirements for recovery for trespass to land under the common law action of trespass

injured the property rights of another.[4]

In rejecting Ms. Gates' argument, the appellate department held that "'[i]n determining what constitutes a criminal trespass we are confined to the statutory law.'" App. 5a (quoting *People v. Harris*, 191 Cal.App.2d at 757-758). This holding, taken from the *Harris* case, was based upon the *Harris* court's determination that "[i]n [California] the common law is of no effect as far as the specification of what acts or conduct shall constitute a crime is concerned." *Harris*, 191 Cal.App.2d at

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were an invasion (a) which interfered with the right of exclusive possession of the land, and (b) which was a direct result of some act committed by the defendant.'") (quoting W. Page Keaton et al., *Prosser and Keaton on the Law of Torts* § 13, at 67 (5th ed. 1984) (footnote omitted)); *Moon v. N. Idaho Farmers Ass'n.*, 140 Idaho 536, 96 P.3d 637, 642 (2004) (Trespass consists of "the wrongful interference with the right of exclusive possession of real property."); *Hildebrand v. Southern Bell Telephone & Telegraph Co.*, 219 N.C. 402, 14 S.E.2d 252, 256-257 (1941) (Exclusivity of possession is the basis for an action in civil or criminal trespass.).

[4] *In re Wallace*, 3 Cal.3d 289, 294-295, 475 P.2d 208, 212, 90 Cal.Rptr. 176, 180 (1970) (Under Cal. Penal Code § 602(j), actual injury or obstruction is required.); *accord*, *In re Ball*, 23 Cal.App.3d 380, 386, 100 Cal.Rptr. 189, 192-193 (1972).

758 (citing Cal. Penal Code § 6); *see also Keller v. Superior Court*, 2 Cal.3d at 631 ("there are no common law crimes in California"). However, as applied in the instant case, this principle ignores the "well-established rule of construction that 'where [a legislative body] uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that [the legislature] means to incorporate the established meaning of these terms.'" *Neder v. United States*, 527 U.S. at 21 (ellipsis omitted) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. at 322); *accord*, *Field v. Mans* 516 U.S. at 69; *accord*, *Ex parte Hudspeth*, 100 Cal.App. at 479 ("The common law is in force as law in this state in the absence of statutory provisions at variance with the common law.").

As noted above, after the appellate department affirmed the judgment of conviction against Ms. Gates, her application to have the case certified for transfer to the California Court of Appeal was denied. App. 10a.

REASONS FOR GRANTING THE PETITION

Ms. Gates' criminal convictions on two counts of trespass have been upheld in this case despite the circumstance that the jury which returned the convictions was not instructed on two contested elements of the charged offenses. The appellate court which upheld Ms. Gates' convictions despite the instructional omissions concluded that the instructional error was not cognizable on appeal because the elements in question are not expressly specified in the statute Ms. Gates was convicted of violating. This ruling, which finds support in the language of some California cases and other authority, is squarely at odds with the principle that elements of a statutory offense may derive not only from the text of the statute, but also from common law. The constitutionally unacceptable result of the disregard of this principle in the instant case is that Ms. Gates has been convicted of crimes by a jury which was not required to find beyond a reasonable doubt that her conduct violated all of the elements of the charged offenses. *United States v. Gaudin*, 515 U.S. at 509; *In re Winship*, 397 U.S. at 364.

Notwithstanding the dominant role of constitutional provisions, statutes, and court rules in our nation's system of criminal justice, "the common law and common law rulings remain

important." 1 LaFave, Israel & King, *Criminal Procedure* § 1.6(h) at 318 (2d ed. 1999); Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. Pa. L. Rev. 335, 337 (2005) ("Even with the advent of criminal codes, it is not uncommon for courts to refer back to common law doctrines.").

"The spirit of the doctrine which denies to the ... judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute." *Morissette v. United States*, 342 U.S. at 263.

In seeking to discern the elements of a criminal offense, reference is first made to the statute the accused is charged with violating. *Neder v. United States*, 527 U.S. at 20. That does not end the inquiry, however, "because in interpreting statutory language there is a necessary second step." *Id*, at 21. "It is a well-established rule of construction that 'where [a legislative body] uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that [the legislature] means to incorporate the established meaning of these terms.'" *Id*. (ellipses omitted) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. at 322); *accord*, *Field v. Mans* 516 U.S. at 69.

"It is commonly thought that the legislature generally wishes the criminal law to do justice and to avoid injustice. Accordingly, it has been held that the congressional omission of the element of intent in a statute, for example, may be explained by the fact that such culpability is so fundamental to criminal liability that the legislature must have assumed its requirement was obvious." Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. Pa. L. Rev. at 380 (footnotes omitted).

In the instant case, the foregoing principles — concerning the need to recognize offense elements which are not mentioned in the statutory text, but which have been well-established in the common law — were not abided by the appellate department. This error, which resulted in the upholding of a constitutionally infirm conviction in the instant case, has been a recurrent problem in California. Indeed, some California courts have recognized that uncertainty in the interpretation of the scope of criminal prohibitions has been engendered by the textual limitations of statutes "and from pronouncements that the common law is not part of criminal law in California[.]" *In re Weller*, 164 Cal.App.3d 44, 46, 210 Cal.Rptr. 130, 131 (1985) (citing *Keeler v. Superior Court*, 2 Cal.3d at 632; *People v. Whipple*, 100 Cal.App. at 262).

Such a pronouncement was seized upon by the appellate department in this case, when that court stated: "'[i]n determining what constitutes a criminal trespass we are confined to the statutory law.'" App. 5a (quoting *People v. Harris*, 191 Cal.App.2d at 757-758). However, as noted in footnotes 3 and 4, *ante*, under well-established common law, the elements of criminal trespass in California include requirements, such as the two contested requirements in the instant case, *viz.*, invasion of another's exclusive right of possession and actual interference with property interests. *People v. Sweetser*, 72 Cal.App.3d at 285; *In re Wallace*, 3 Cal.3d at 294-295.

Because the appellate department's application of an unduly restrictive interpretation of elements of trespass under Cal. Penal Code § 602 enlarged the reach of the offense by constituting the offense from something "less than the incriminating components contemplated" by both the words used in the statute and relevant common law interpretation, *Morissette v. United States*, 342 U.S. at 263, Ms. Gates' conviction is constitutionally infirm. Furthermore, because this result is inconsistent with this Court's precedent, and because judicial error of this nature has proven to be a recurrent problem, review on certiorari is warranted in this case.

CONCLUSION

"This would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried and submitted to the jury as to raise questions both fundamental and far-reaching in federal criminal law...." *Morissette v. United States*, 342 U.S. at 247.

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

VICTOR S. HALTOM
Attorney for Petitioner
JANICE E. GATES

January 16, 2007

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF EL DORADO

APPELLATE DEPARTMENT

THE PEOPLE	)	El Dorado County
Plaintiff,	)	Superior Court
	)	Case No.
vs	)	P03CRM1409
	)	
JANICE ESTELLE	)	
GATES	)	
Defendant	)	

DECISION ON APPEAL

On August 18, 2004, the Court amended the criminal complaint filed in this action on the motion of the people to conform to proof to reflect charges of violations of Penal Code § 602(j) [CT 31]. There was no objection by the defense. That section stated at the time of the acts charged, May 28, 2003 (Count 1) and February 2, 2003 (Count II):

> Except as provided in Section 602.8, every person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor:

(j) Entering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstruction, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent or by the person in lawful possession.

On August 20, 2004, a jury found appellant guilty of both counts.

FACTS:

Tammy Larsen has lived at 3121 Freshwater Lane, El Dorado for six and one-half years. In February 2003 she received a telephone call from Chris Savage, a neighbor at the end of Freshwater Lane. As a result of the call, she put her four year old son in her van and drove to Savage's property. She saw appellant, appellant's daughter and appellant's granddaughter riding horses in a northerly direction towards their property. Larsen stopped her vehicle when she saw appellant and videotaped them riding along the road.

When she arrived as the Savage's residence, she picked up Ms. Savage and returned towards the property. She saw appellant, her daughter and granddaughter on horses at the Oliver's driveway on

Freshwater. Larsen again videotaped them, videotaping as she followed appellant. When she finished, she called the Sheriff's Office, made a complaint, and gave the videotape to the deputy. The videotape was played for the jury and the witness identified various locations on the tape.

Bill Michaels has lived at 2949 Michael's Mountain Road, El Dorado for seven years. On May 28, 2003, he and his wife returned to their property about 12:15 p.m. He has an easement to use Freshwater Lane. As they left the Gates' property, they saw appellant and her granddaughter on the VanLinburgh's property in appellant's truck; he took a picture of the appellant and the truck. They followed appellant and continued photographing. They returned home and called the sheriff.

Robert VanLinburgh lives on Zephyr Lane in EL Dorado County. When he purchased the property he received a deeded easement to use Freshwater Lane. In January 2002, he wrote a letter to the Gates advising them that he did not want them trespassing on his property. Subsequently he has never given the Gates permission to be on his property. He identified various photographs; the May 28, 2003 photograph shows appellant's pickup on VanLinburghs' property. He also viewed the videotape and identified appellant on horseback entering on his property.

Deputy Jeff Leikauf has been employed by the El Dorado County Sheriff's office for fifteen years. On May 28, 2003 he responded to a call by Mr. Michaels. He then contacted appellant at her residence. He asked her if she had been on property that was beyond her own property line on Freshwater Lane and she stated that she had. She stated that she was allowed to be on that portion of Freshwater Lane. She was teaching her granddaughter to drive. Deputy Leikauf advised her that there was a court order prohibiting her from being there; she stated that the court order was wrong. When he told her that there was a court order, he was basing that information on what Mr. Michael's had told him.

Counsel stipulated that pursuant to a judgment of the El Dorado Superior Court in 1988, as amended in 1992, appellant "does not have a right to cross over the properties, nor has she established a prescriptive easement for the properties beyond her property line on Freshwater Lane." [RT 98].

The defense called appellant. She and her husband have lived on their 40-acre parcel for twenty-seven years. On February 2, 2003, Ms. Larsen videotaped her. Appellant, her daughter and granddaughter were riding horses two miles back on the ranch behind her property; it belonged to Pam Cayuga. In September of the previous year Pam had

extended an invitation to appellant to come see her at any time. Because of that invitation, appellant believed she had permission to use Freshwater Lane on February 2, 2003 when she and her family rode horses over the VanLinburgh property to Pam Cayuga's house. She understood that there was a court judgment that preceded that date that she did not have any rights to use that road or any easement over that road at that time, but she understood herself to be using the road as Ms. Cayuga's guest. On January 4, 2004 she wrote to Ms. Cayuga but did not get a response. Ms Cayuga has never retracted or rescinded her invitation.

On May 28, 2003 she had contact with Mr. Michaels when she and her granddaughter were in her pickup truck. Her granddaughter drove to the O'Connors' property. In the past she has sprayed Roundup on weeds on O'Connors' property with his permission. That is what she had been doing on May 28, 2003. She was aware on that date that she did not have an easement or right to use the road based upon the court judgment, but she had Mr. O'Connor's permission. She later wrote to Mr. O'Connor to get his permission in writing but she did not receive a response from him, although he has never retracted or rescinded his permission.

On cross-examination, appellant testified that O'Connor had given his permission to use his property "for horses or weed control" in 1976 or

1977. She telephoned O'Connor after the 1992 court judgment to secure his permission to use his property, which he gave her. She does not remember when this telephone call occurred, nor does she recall the last time she saw him or spoke to him. She did not attempt to contact Pam again until the letter she wrote in January 2004, to which she received no response. The conversation with Pam in September 2002 was the only conversation she had with her in life.

Jessica Gates is appellant's granddaughter; she is 16. On February 2, 2002 Jessica, her mother and grandmother were riding horses to Pam Cayuga's house to see how she was doing. She had previously met Pam in September 2002. Pam said that they could visit her anytime and ride horses on her property. On May 28, 2003 she went to a property with her grandmother and did some weed spraying; she was not sure whose property it was.

Pam Cayuga was called by the People as a rebuttal witness. She lives at 3577 Freshwater Lane. She has lived there for two years. In 2002 she was driving her truck through the gates when she met appellant; they talked about horses. Pam never gave appellant permission to come on her property whenever she wanted, did not give her permission to come and visit whenever she wanted, and did not give her permission to be on her property whenever she wanted. Pam never gave appellant permission to

be on her property. She received the letter appellant sent her in January 2004; she did not agree with appellant's version of their September 2002 conversation so she did not send it back.

Joseph O'Connor first met appellant when she bought her property in the mid 70's. At that time appellant mentioned that she and her family liked to go walking on trails in the back of the hills and she asked if he minded if they walked across his property; he didn't have any objection to that. The permission was "limited to casual use, you know, walking across it, to egress the trails." He never gave her permission to spray weeds on his property. He is certain about that because he was involved in spraying Agent Orange in Viet Nam and is very sensitive about herbicides; he has participated in Department of Defense studies involving those exposed to herbicides in Viet Nam. He did not respond to appellant's letter because of the past litigation history will appellant "so when I got this letter, I suspected an ulterior motive" as he believed "things were starting to heat back up there with regard to the case."

DISCUSSION:

Appellant first contends that the trial court erred in failing to instruct the jury on all the elements of the offense.

"[I]n determining what constitutes a criminal trespass we are confined to the statutory law" [*People v. Harris* (1961) 191 Cal.App.2d 754, 757-758]. The statute is stated above; under the statute, the elements of the offense are willful entrance on the lands of another, done either (1) for the purpose of injuring any property or property rights or (2) with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent or by the person in lawful possession.

Penal Code § 7(1) provides: "The word 'willfully', when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage."

With respect to the offenses charged, the Court instructed the jury as follows [RT 249]:

"Anyone who enters any land whether unenclosed or enclosed by a fence for the purpose of injuring any property or property rights is guilty of the crime of trespass. To prove this crime, the following elements must be proved:

"One, a person entered upon the land.

"Two, the land is not owned by said person.

"Three, the person entered the land with the purpose of injuring the property or the property

rights of the landowner.

"Injuring property rights means any wrongful violation, disregard, or interference with another's property rights."

The jury was further instructed that "It is lawful for a person to be present on another's property when she had permission to be on the property and is acting within the scope of the permission given by the owner. And in these circumstances the person so invited has the right to access the owner's property in the same manner as the owner does. In the case of the trespass charged herein, there was no criminal intent to injure the victim's rights if the defendant received such permission and acted withing the scope of the permission granted."

At oral argument, defense counsel argued [RT 286]:

> There is no question that she was on the VanLinburgh's property on 2/2/03 and also on 5/28/02 [sic]. There is no question. We told you in the beginning there is no real question as to– in my opening statement there is no issue as to what factually occurred that day. The only issue as whether or not she had a right to do that. That's what this case is all about.
>
> To prove the crime, the following elements

must be proven: A person entered the land. Well, she did enter the land. No question about it. The land was owned– was not owned by her, it was not. And then, third, the person entered the land with the purpose of injuring the property or the property rights of owner.

A comparison of the wording of the statute, which is the text for determining the elements of the offense, the instruction given by the trial court, and indeed the argument of defense counsel demonstrate that the jury was properly instructed. Any error assigned by appellant in her opening brief is harmless error [*People v. Magee* (2003) 107 Cal.App.4th 188, 194].

Appellant then contends that the trial court deprived her of a defense by refusing to allow appellant to prove, in her criminal trial, that she had a prescriptive easement. Appellant contends that from the evidence she could establish a prescriptive easement based upon five years of spraying Roundup on O'Connor's property. Several immediate problems are apparent, not least the question of whether appellant could acquire a prescriptive easement in view of the 1992 Amended Judgment in Cases 37721 and 40480, which provides, in paragraph 7, that defendants (the Gates) "do not have a right to cross over the properties" as identified in various exhibits to the amended

judgment. There is also no authority cited by appellant that would allow a trial on a civil issue to be pursued in the midst of a criminal trial. The fact is that appellant did not have an established prescriptive right, a remedy she could have pursued civilly and failed to do.

The prescriptive easement issue arose at the very end of the jury trial, which lasted four days. After Cayuga and O'Connor had been called as rebuttal witnesses, appellant was recalled by the defense. After examining appellant, defense counsel approached the bench and commented "I think that these answers are establishing a prescriptive right." After argument, the Court sustained the People's objection to introducing testimony regarding the supposed prescriptive easement [RT 240]. The Court also refused appellant's request for a jury instruction on the prescriptive easement theory. The Court stated that in view of the long history of litigation between appellant and her neighbors, the evidence had been confined to the alleged trespass on the two charged dates at appellant's request; appellant was now "com[ing] at the midnight hour on surrebuttal and say[ing] 'Wait a minute, I want to raise a claim of prescriptive easement.'" [RT 302]. The Court excluded the evidence and rejected the requested instruction based upon notice and due process concerns. The Court was acting within its powers in so doing.

DECISION:

Judgment of the trial court is asfirmed.

Dated: 8/02/06
SUZANNE N. KINGSBURG, PRESIDING
JUDGE OF THE SUPERIOR COURT

Dated: 08/09/06
GERALD LASAROW
JUDGE OF THE SUPERIOR COURT

Dated: 07/28/06
DOUGLAS C. PHIMISTER
JUDGE OF THE SUPERIOR COURT

CLERK'S CERTIFICATE OF MAILING

I, LYNN CAVIN, Deputy Clerk of the Superior Court of the County of El Dorado, State of California, do hereby certify that I am a citizen of the United States and employed in the County of El Dorado; I am over the age of eighteen years and not a party to the within action; my business address is Superior Court of the State of California, County of El Dorado, 495 Main Street, Placerville, 95667; and that I delivered a copy of the **DECISION ON APPEAL** to the individual(s) listed below:

VICTOR S. HALTOM
428 J STREET, SUITE 350
SACRAMENTO, CA 95814

EL DORADO DISTRICT ATTORNEY
515 MAIN STREET
PLACERVILLE, CA 95667

I am familiar with the business practice of El Dorado County Superior Court with regard to collection and processing of documents for mailing. The documents described above were placed for collection and mailing in Placerville, California, through either the United States Post Office, Inter-Departmental Mail or Courthouse Attorney Box.

Executed on August 11, 2006 at Placerville, California.

EL DORADO COUNTY SUPERIOR COURT

By: Lynn Cavin

LYNN CAVIN, APPEALS CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF EL DORADO

APPELLATE DEPARTMENT

THE PEOPLE	)	El Dorado County
	)	Superior Court Case
Plaintiff,	)	No. P03CRM1409
vs	)	
	)	
JANICE ESTELLE GATES,	)	
	)	
Defendant.	)	

ORDER RE APPLICATION FOR CERTIFICATION FOR TRANSFER

The Court declines Appellant's Application for Certification of Transfer to the Third District Court of Appeal based upon California Rules of Court, Rule 63(b)(2), as it does not believe that the transfer is necessary to secure uniformity of decision or to settle an important question of law.

Dated: 03/27/06

SUZANNE KINGSBURY, PRESIDING JUDGE OF THE SUPERIOR COURT

Dated: 09/01/06

DOUGLAS C. PHIMISTER, JUDGE OF
THE SUPERIOR COURT

CLERK'S CERTIFICATE OF MAILING

I, LYNN CAVIN, Deputy Clerk of the Superior Court of the County of El Dorado, State of California, do hereby certify that I am a citizen of the United States and employed in the County of El Dorado; I am over the age of eighteen years and not a party to the within action; my business address is Superior Court of the State of California, County of El Dorado, 495 Main Street, Placerville, 95667; and that I delivered a copy of the **ORDER RE APPLICATION FOR CERTIFICATION FOR TRANSFER FILED SEPTEMBER 6, 2006** to the individual(s) listed below:

VICTOR S. HALTOM
428 J STREET, SUITE 350
SACRAMENTO, CA 95814

EL DORADO DISTRICT ATTORNEY
515 MAIN STREET
PLACERVILLE, CA 95667

I am familiar with the business practice of El Dorado County Superior Court with regard to collection and processing of documents for mailing. The documents described above were placed for collection and mailing in Placerville, California, through either the United States Post Office, Inter-

Departmental Mail or Courthouse Attorney Box.

Executed on September 6, 2006 at Placerville, California.

EL DORADO COUNTY SUPERIOR COURT
By: Lynn Cavin
LYNN CAVIN, APPEALS CLERK